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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROBERT A. COLLINS,

Plaintiff and Appellant,

v.

AARON FELDMAN et al.,

Defendants and Appellants.

D036925

(Super. Ct. No. 724762)

APPEAL and CROSS-APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Hayes, Judge. Reversed and remanded with directions.

Robert A. Collins appeals from the portion of a judgment denying him specific performance of a provision in a partnership agreement providing for the liquidation and sale of partnership assets upon dissolution of the partnership. Collins contends the judgment must be reversed because the trial court abused its discretion in denying such relief.

Aaron Feldman, Sunroad Marina, Inc., and Marina Holding Partners, L.P. et al. (together Sunroad) have cross-appealed from the portion of the trial court's order granting Collins summary adjudication on the cause of action for declaratory relief that decrees Sunroad is required to sell the partnership assets on the open market and is not entitled to distribute them in-kind to itself or an entity it controls.

We agree with Collins that the trial court abused its discretion in denying specific performance. Further, we conclude that in ruling Sunroad is required to sell the partnership assets on the open market and cannot distribute them to itself or an entity it controls, the trial court acted within its discretion in implementing the controlling provision of the partnership agreement and granting Collins the declaratory relief he requested in his complaint. Accordingly, we reverse the portion of the judgment denying specific performance, and direct the trial court to grant specific performance of the partnership agreement as set forth in the order granting declaratory relief.

FACTUAL AND PROCEDURAL BACKGROUND

This matter stems from a lengthy dispute between the Harbor Cove Marina Partners, a partnership whose major asset was the Sunroad Resort Marina on Harbor Island in San Diego. The partnership consisted of Collins, a 10 percent partner; Sunroad Marina, Inc., a 70 percent partner and also the managing general partner; and Marina Holding Partners, L.P., a 20 percent partner. Feldman was Sunroad's president.

On May 26, 1998, Sunroad informed Collins it intended to dissolve the partnership and sell the partnership assets and distribute the proceeds pursuant to paragraph 12 of the partnership agreement, which calls for Sunroad, upon dissolution of the partnership, to

"liquidate the Partnership by selling the Partnership property" and distribute the proceeds to the partners pro rata after paying all partnership debts and liabilities. On August 21, 1998, however, Sunroad informed Collins that the dissolution constituted a "Major Event" under paragraph 9.5 of the partnership agreement and thus, pursuant to paragraphs 8.5 and 8.6 of the agreement, which provided for the distribution of partnership assets in-kind based on their fair market value, it intended to distribute to Collins the cash value of his share in the partnership based on an appraisal of the fair market value of the marina as of July 31, 1998 in the amount of \$16,500,000.

On October 7, 1998, Collins filed a complaint against Sunroad for declaratory relief, accounting, and damages based on several tort theories. Collins sought a declaration from the trial court that the buyout provisions in paragraphs 8 and 9 providing for distribution of a partner's share in the partnership based on an appraisal of the partnership assets did not apply; rather, since Sunroad dissolved the partnership, paragraph 12 pertaining to liquidation upon dissolution applied. Specifically, Collins prayed for a declaration that (1) "As the Liquidator, [Sunroad] is required by the [partnership agreement] to sell Sunroad Marina on the open market at the highest price it can procure after a reasonable marketing effort and to divide the net cash proceeds among the partners . . . ;" and (2) "[Sunroad] is not legally entitled to distribute [the partnership's] only substantial asset, Sunroad Marina, in kind to itself and an entity it controls (a non-taxable event) while distributing cash to Collins (a taxable event)."

On December 8, 1998, Sunroad sent Collins a check for \$389,662, which it maintained was the value of his partnership interest, based on a fair market value

appraisal of the marina. Collins did not accept the distribution check; rather, he deposited it with the clerk of the court.

In January 1999, Collins and Sunroad filed cross-motions for summary adjudication on the cause of action for declaratory relief. The court granted Collins's motion and denied Sunroad's. In the ruling of May 25, 1999, the court held that Sunroad provided notice of dissolution of the partnership by letter on May 26, 1998, and thus, the winding up process of the partnership was governed by paragraph 12, "which requires liquidation of the Partnership assets[.]" and that the dissolution of the partnership was not a major event under paragraph 9.5, and thus, the buyout provisions in paragraphs 8 and 9 did not apply.

Collins then prepared an order granting summary adjudication and declaratory relief which decreed, as prayed for in the complaint, that Sunroad was required to sell the marina "on the open market at the highest price [it] can procure after a reasonable marketing effort . . . " and was "not legally entitled to distribute Sunroad Marina . . . in kind to itself and/or an entity or entities it controls while distributing cash to Collins." Sunroad did not approve the order and decree; however, it was signed and filed by the court on August 11, 1999.

Thereafter, Sunroad did not put the marina on the market, or take any steps to do so. Therefore, on October 7, 1999, Collins amended his complaint to add a cause of action for specific performance -- compelling Sunroad to comply with the terms of paragraph 12 and the trial court's order granting him declaratory relief. The cause of action for specific performance and remaining causes of action were tried before the

court in April 2000. The court found for Sunroad and against Collins on all the causes of action, and in particular, denied Collins specific performance of the provisions of paragraph 12 of the partnership agreement.

DISCUSSION

The result of the trial court's denial of specific performance is that Sunroad was allowed to operate under the buyout provisions in paragraphs 8 and 9 of the partnership agreement, even though the court correctly ruled that these provisions did not apply; rather, paragraph 12 applied and required Sunroad to liquidate the marina leasehold and distribute the proceeds. Thus, Sunroad was allowed to do what the partnership agreement and the trial court expressly stated it could not. As we explain, under these circumstances, the court's denial of specific performance was an abuse of discretion. (See *Petersen v. Hartell* (1985) 40 Cal.3d 102, 110; *Pluth v. Smith* (1962) 205 Cal.App.2d 818, 827.)

In appealing the court's August 11, 1999 order granting declaratory relief, Sunroad does not challenge the court's ruling that the provisions in paragraph 12 applied and not the buyout provisions under paragraphs 8 and 9. Rather, Sunroad contends the court erred in decreeing it is required to sell the marina on the open market to the highest bidder (i.e. conduct a public sale) and cannot distribute this asset in kind to itself or to entities it controlled, because these requirements are not set forth in paragraph 12 of the partnership agreement or in the court's May 25, 1999 ruling in favor of Collins on his motion for summary adjudication. We agree that this language is not contained in paragraph 12 or the court's May 1999 ruling. We assume, however, that the court read

the order submitted by counsel containing such language before signing it. It does not appear that the court abused its discretion in implementing the liquidation/sale provisions in paragraph 12 by granting the declaratory relief prayed for in the complaint and calling for a public sale of the marina and prohibiting an in-kind distribution. (See *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal.App.4th 881, 892-893.) Indeed, under the circumstance of this case, to allow for a private sale or an in-kind distribution to Sunroad or an entity it controls, could have the effect of allowing Sunroad in essence to operate under the buyout provisions under paragraphs 8 and 9 of the partnership agreement, which, again, the court correctly ruled Sunroad cannot do.

DISPOSITION

The judgment is reversed to the extent it denies specific performance. The matter is remanded with directions to the trial court to grant specific performance of the provisions of paragraph 12 of the partnership agreement as decreed in its August 11, 1999 order granting declaratory relief. Costs on appeal are awarded to Collins.

McINTYRE, J.

WE CONCUR:

McDONALD, Acting P. J.

McCONNELL, J.